No. 77-1722

In the Supreme Court of the United States

OCTOBER TERM, 1978

LAWRENCE DALIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not yet reported. The opinion of the district court (Pet. App. 10a-18a) is reported at 426 F. Supp. 862.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1978. The petition for a writ of certiorari was filed on June 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in executing a valid court order authorizing the interception of oral communications in petitioner's office, law enforcement agents lawfully

entered the office, without separate express judicial authorization, to install the device used to make the interceptions.

2. Whether petitioner's sentence is excessive.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of receipt of goods stolen from an interstate shipment, in violation of 18 U.S.C. 2315, and conspiracy to transport, receive, and possess goods stolen from an interstate shipment, in violation of 18 U.S.C. 371. Concurrent five-year prison terms were imposed on the two counts. The court of appeals affirmed (Pet. App. 1a-8a).

1. The evidence at trial showed that on March 27, 1973, one of a group of fabric thieves asked petitioner if he could store "a load of merchandise" on petitioner's business premises (Tr. 1.64). Petitioner refused this request because three months before he had stored stolen fabric for the same group but had been angered about the way that transaction had been handled and about the fact that he had been paid only $300 to store the stolen property (Tr. 3.140-3.141, 3.167-3.173, 4.57-60, 4.73-4.75). Instead, petitioner arranged for another associate, Joseph Higgins, to store the stolen material, and the two agreed to split the $1500 fee for concealing it (Tr. 3.162-3.163).

On April 3, three men hijacked a Farah Manufacturing Company tractor trailer in Brooklyn, New York. The truck, which was carrying more than 600 rolls of fabric, was unloaded at Higgins' warehouse and then abandoned on Staten Island (Tr. 1.72-1.73, 3.68-3.77, 3.160-3.161, 4.64-4.69). Two days later, FBI agents arrested Higgins and four others while they were loading the rolls of fabric into two U-Haul trucks (Tr. 2.29-2.30, 3.163-3.166).

After petitioner learned of the arrests, he discussed with Higgins moving everything that was not legitimate out of Higgins' warehouse (Tr. 3.183, 3.196), and he advised another associate that "[y]ou can only play with fire so long * * * we'll just have to legit * * * we'll just have to lay off the hot merchandise" (Tr. 3.99-3.100). That night, petitioner was expecting a mailtruck carrying $2.5 million in currency to be hijacked and the currency to be brought to him. When he learned of the arrests, he directed that the hijacking be called off; he later learned that the mailtruck hijacking had been "bad news" (Tr. 3.86, 3.184-3.186).

2. At trial, the government introduced evidence of telephone conversations to which petitioner was a party and also of seven conversations that took place in his office. The telephone conversations were intercepted pursuant to an order entered by the district court on March 14, 1973, and a subsequent order entered on April 5. The admission of those conversations is not challenged here. Petitioner challenges only the admission of seven conversations in his office that were intercepted by a listening device. Those conversations were intercepted pursuant to an order of the district court entered on April 5, 1973. The night that the order was entered, FBI agents secretly entered petitioner's office and installed a listening device with which to make the interceptions (C.A. App. 101).[1]

The interceptions of both wire and oral communications were continued pursuant to a court order of April 27, 1973. On May 16, 1973, all electronic surveillance ended, and FBI agents removed the listening device from petitioner's office. Between April 5 and May 16, no entries into the premises were made by government agents (C.A. App. 102).

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[1] "C.A. App." refers to the joint appendix in the court of appeals.

Prior to trial, petitioner moved to suppress the conversations intercepted by means of the listening device. Following a post-trial evidentiary hearing, the suppression motion was denied (Pet. App. 10a-18a). The district court found that the interception was lawful and that "the safest and most successful method of accomplishing the installation of the [device] was through breaking and entering the premises in question" (Pet. App. 17a). The court further concluded that once the court had found that there was probable cause to support the interception, "implicit in the court's order is concomitant authorization for agents to covertly enter the premises in question and install the necessary equipment" (Pet. App. 18a). Accordingly, the court concluded that it was not necessary under the circumstances of this case for the government to obtain explicit judicial approval for the entry (*ibid.*).

The court of appeals affirmed, noting that Judge Lacey, the judge who had both authorized the interception and tried the case, had "found that in this case a surreptitious entry was within contemplation" when the interception was authorized (Pet. App. 6a-7a). The court stated that it would not adopt a rule that specific authorization for an entry to install a listening device is never required, but it held that in this case, where the entry was contemplated by the issuing judge, where it was supported by probable cause and executed in a reasonable fashion, and where it was the most effective means for installing the listening device, separate judicial authorization for the entry would not be required (Pet. App. 7a).

ARGUMENT

1. Petitioner contends (Pet. 7-14) that the surreptitious entry into his office to install a court-authorized listening device violated his Fourth Amendment rights because the

entry was not separately and explicitly authorized by the district court. This Court recently declined to review a similar contention in *Vigorito, et al.* v. *United States*, certiorari denied, Nos. 77-1002, 77-1003, 77-1004, 77-6026, 77-6035, and 77-6165, May 15, 1978, and, for the reasons set out in our brief in opposition in that case, we submit that review should likewise be denied here.[2]

As we argued in our brief in opposition in *Vigorito* and as the district court found in this case, oral communications are normally intercepted by placing a listening device within the premises in which the interceptions are to occur. Thus, as the district court also found, the secret entry to install the listening device was implicitly authorized by the court order approving the interceptions at petitioner's office. The entry thus did not violate petitioner's rights under either the Fourth Amendment or Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

While two other circuits have announced divergent views on the issue presented by this case, both decisions arose in a context different from that presented here and in *United States* v. *Scafidi*, 564 F. 2d 633 (C.A. 2), certiorari denied *sub nom. Vigorito* v. *United States*, Nos. 77-1002 *et al.*, May 15, 1978. The decision of the District of Columbia Circuit in *United States* v. *Ford*, 553 F. 2d 146, involved a re-entry to repair a listening device. The court there held that the district court had improperly delegated to government agents the right to make re-entries in any number and manner without any showing of the necessity for such broad authorization. The Fourth Circuit's decision in *Application of United States*, 563 F. 2d 637, arose prior to any interceptions and held only that the government must establish a "paramount" or "compelling" need to justify judicial authorization of a surreptitious entry to install a listening device. Thus, while

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[2]We are sending petitioner a copy of our brief in opposition in *Vigorito*.

both opinions do contain language suggesting that those courts would not agree with the subsequent decisions of the Second and Third Circuits in *Scafidi* and the instant case, respectively, there is no actual conflict between the holdings in *Ford* and *Application of United States* and the holding in the instant case.

Moreover, as we noted in our brief in opposition in *Vigorito* (pp. 18-19), the federal government has adopted a policy of seeking express judicial approval prior to undertaking any entry or re-entry to install or maintain a court-authorized electronic listening device. Accordingly, we do not anticipate that this issue will be of sufficient continuing importance to require resolution by this Court.

Indeed, there is even less reason for review in this case than there was in *Vigorito*. There, FBI agents entered the premises under surveillance not only to install and remove the listening devices, but also to repair and move the devices. These additional entries, while essential to the proper execution of the interceptions in that case, are not required in every case and may arguably be outside the contemplation of the issuing judge at the time surveillance is approved. In this case, by contrast, the single surreptitious entry required to install the listening device was contemplated by the district court when the interceptions were authorized (Pet. App. 6a).[3]

Finally, even assuming that the entry into petitioner's office was unlawful, the error in the introduction of evidence derived from the interceptions was harmless. The evidence most damaging to petitioner consisted of the

[3]While most of the petitioners in *Vigorito* lacked standing to contest the validity of the surveillance-related entries, one of the petitioners, James Napoli, Sr., clearly had standing to raise the issue.

testimony of eye-witnesses, including co-conspirator Higgins, and telephone conversations overheard by means of wire interceptions that involved no entries into petitioner's office. The oral interceptions were not initiated until after the Farah truck was hijacked and Higgins and his associates were arrested. The subsequent oral interceptions produced only evidence of petitioner's concern about the possible discovery of other stolen merchandise and his efforts to prevent the disclosure of his role in the illegal scheme. Under these circumstances, there can be little doubt that the jury's verdict would have been the same even if the evidence derived from the oral interceptions had been excluded. See *Milton* v. *Wainwright*, 407 U.S. 371; *Chapman* v. *California*, 386 U.S. 18.

2. Petitioner further contends (Pet. 15-16) that the sentence imposed by the district court was too harsh. The short answer to this claim is that the sentence was within the statutory limits and therefore not subject to appellate review. See *Dorszynski* v. *United States*, 418 U.S. 424, 440-441; *Gore* v. *United States*, 357 U.S. 386, 393.

Neither *Woosley* v. *United States*, 478 F. 2d 139 (C.A. 8), nor *United States* v. *Robin*, 545 F. 2d 775 (C.A. 2), holds, as petitioner suggests (Pet. 16), that a sentence within statutory limits may be reviewed as unduly harsh in light of the nature of the offense. In *Woosley*, the trial judge followed a mechanical approach of sentencing all defendants convicted of refusing induction into the armed forces to the statutory maximum and therefore failed to exercise his discretion in that class of cases. In *Robin*, the defendant was denied a fair opportunity to rebut government evidence, unrelated to the heroin conviction for which sentence was being imposed, that the defendant was a major heroin trafficker. Thus, both cases involved

infirmities in the process by which sentence was imposed, not review of the length of the sentence. See *Dorszynski* v. *United States, supra,* 418 U.S. at 443.

In any event, petitioner's contention that he played a "limited" role in the offenses for which he was convicted is belied by the record, which shows that, as the district judge stated at sentencing, "Mr. Dalia played a very important, very significant role in the matters that are subject to this conviction" (C.A. App. 137).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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